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THE CRIMINAL LIABILITY OF LEGAL ENTITIES IN COLOMBIA

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Abstract: This article carries out an analysis of the responsibility of legal entities in Colombia based on the law compared to other countries and the review of the jurisprudence of the Colombian high courts, in which we can infer the omission on the part of the legislator to regulate the issue, We also observe how the Constitutional Court has issued constitutional rulings trying to clarify the regulatory void. To carry out this investigation, the qualitative method was used, given the understanding of criminal acts carried out by legal entities within the legal framework of society and on the competence of the criminal responsibility of ideal or moral entities, in our Colombian legal system.
Keywords: Criminal liability, Criminal law, Comparative law, Legal entities.

INTRODUCTION

The discussion on the criminal liability of legal entities emerges as a relevant, useful and novel legal debate. In this context, it is imperative to clarify the legal basis to adopt a correct position, considering that the reputation of these entities is at stake; But, on the other hand, one cannot ignore the interest raised by the issue of possible criminal sanctions that the legal representatives of these legal entities may face. The majority doctrinal opinion still maintains that punishable sanctions must only affect natural persons and not corporate entities or rather, legal entities; Therefore, if we approach the issue from the point of view of harmfulness and therefore, the importance of legal assets, we would have to take into account a new hypothesis of criminal law where precisely the active subjects with the greatest criminological capacity are the corporate entities, however, what happens in reality is that legal entities are not sanctioned but rather natural persons and this is related to the analysis of the unjust, as this configures a category that has always been recognized as belonging to the human condition.

But in reality, the controversy about whether there is the possibility of legal entities being criminally responsible or not in light of the current circumstances of organized crime, cannot be resolved based on the contrast between the theory of fiction and reality. theory of reality, since today it is imperative to admit that the legal entity is a real entity, which due to its particular characteristics can carry out conduct that threatens an entire society as will be demonstrated in this article.

METHODOLOGY

The methodological design carried out was a qualitative investigation accompanied by a hermeneutic approach of a documentary type, in order to understand, through comparative law, the criminal acts that occur within legal entities within the legal framework of society and on what competent of the criminal responsibility of ideal or moral entities, being fully aware of it.

On the other hand, it must be noted that the approaches of those who reject criminal imputability to legal entities, especially referring to the lack of action, the absence of guilt and the incompatibility with the function and purpose of the penalties, are refuted by admitting their possible reworking and adaptation. to a new system proposed through the Theory of Reality.

INTERNATIONAL REGULATIONS OF CRIMINAL LAW TO DETERMINE THE RESPONSIBILITY OF LEGAL PERSONS

Starting from the legal parameters applied in today's world, we can infer that the scope in criminal matters of the liability of legal persons is often not applicable to the objective reality between the facts and the provisions of law, so positive law in The modern world is an instrument to ensure legal and constitutional guarantees in which globalization, understood as a social process, has in turn given rise to new forms of crime.

One of the most perverse effects of globalization is undoubtedly "global", or "globalized" crime, in the same sense in which we speak of globalization of the economy, that is, in the sense that, due to the acts carried out, or by the subjects involved, it is not developed only in a single country or state territory, but, along with the economic activities of large multinational corporations, therefore criminal science, which has revolved around its own constructions of the theory of crime over the years, has been evolving and with it the core concepts of its structure for the configuration of the criminal type, this has to do with natural persons, but little by little another class begins to be incorporated of subjects, who despite not having the corporeality that characterizes natural persons, may well affect rights and guarantees, which may put the social balance at risk. This situation is presented from the point of view of guilt, since Think of it as a judgment of reproach that embodies the analysis of human behavior and that seeks to establish a relationship between the result of criminal behavior, the norm, the conscience of the individual, his capacity and the demand that he must receive from the social conglomerate and from This way, it is determined that if the subject, although he could act differently, acted typically and illegally, he must be considered guilty, so that although legal entities may generate legitimate expectations in society, they are not in the capacity to disavow or disrespect for themselves a legal norm, on the other hand we see how some writers have been recognizing criminal liability for legal persons and these in turn have been introduced into criminal legislation in the world in a gradual and differentiated manner since the problem of crime that develops within the framework of the company has generated in criminal doctrine and jurisprudence the challenge of responding to this phenomenon, in such a way as to avoid gaps in punishability in criminal matters that concern legal entities, It can also be seen how at an international level, most countries, faced with the growing power of large companies, have resorted to certain forms of criminal repression.

Some countries, especially Anglo-Saxon, have extensive experience in this matter.

France introduced, in 1994, a general liability for legal entities; Finland followed in 1995, in the same way there are also bills in this sense in Switzerland, Belgium, as well as in Eastern European countries such as Lithuania, Hungary, Poland, now in our current situation in which they are in increase in criminal legislation that recognizes criminal liability of legal entities, everything seems to indicate that it would be only a matter of time before this theory is also recognized in Colombian criminal legislation, but to do so we must first disprove the classic theory in which legal person is not an attributable subject from a criminal point of view, so the criminality carried out within these legal entities must be addressed from institutes such as the act by another clause, also from the theory of authorship mediated by organized power apparatuses proposed by Roxin, in the same way there is the theory of the model of criminal self-responsibility of

legal entities, either because the legal entity as a subject within a system acts contrary to the role that corresponds to it and affects with this to third parties, or because the organization presents an institutional defect that makes it more prone to damaging legal rights, which is why currently, although the Colombian Penal Code in the general part does not contemplate the possibility of punishing directly to the legal entities through which criminal behavior is carried out, this by virtue of the act by another clause contained in art. 29 of the Penal Code, there are other provisions of the Colombian criminal legal system, which establish for legal persons involved in crimes that may be punitive of their legal personality. Some sectors of the doctrine consider that such normative provisions do not constitute a form of criminal liability for collective entities, which is why in certain countries in which the criminal liability of legal entities is not openly accepted, they have been established for the sake of make up for the deficit of punishment, the so-called accessory measures, whose objective is to limit behaviors that offend the criminal legal system, on the other hand, we can appreciate a global view in which Legislations of countries such as France, England, Canada and the United States The United States establishes such responsibility, so we will look in detail at how the world takes a position on this type of criminal responsibility.

SPAIN

Spain ended the deeply rooted Romanist theory according to which legal entities are not liable in the field of Criminal Law, so the formula of acting was used instead, with Organic Law 5 of 2010, an end to impunity on the part of collective entities when they commit crimes in said country.

The Spanish legislator, with said reform, then indicated that legal entities may be called to respond criminally to those crimes specifically indicated in the law, to this end, he introduced article 31 bis, according to which in the cases of facts provided for in the criminal law, "legal persons will be criminally responsible for crimes committed in their name or on their behalf, and for their benefit, by their legal representatives and de facto or de jure administrators." He also pointed out a second route of imputation in the sense that, in the face of the same crimes expressly indicated, "legal persons will also be criminally responsible for the crimes committed, in the exercise of social activities and on behalf of and for the benefit of the "by those who, being subject to the authority of natural persons, have been able to carry out the acts because due control has not been exercised over them taking into account the specific circumstances of the case." Naturally, it must be understood that, if the event in question corresponds to a case of unfaithful administration, that is, outside the mandate and with excess of the factor, the legal entity could not be called to respond criminally, even if it had obtained benefit.

We can also mention that, within the Spanish model, this stands out for the responsibility that is generally necessary for the connection between the natural person who carries out the conduct and the management of it for the legal entity. However, there is an event of self-responsibility when it is not possible to identify the natural person. We can also mention that the provisions relating to the criminal liability of legal entities, according to Spanish law, naturally cannot be extended to the State or its territorial entities. regulatory entities or public business entities, in the same way it is made clear that the criminal liability of legal entities may be declared regardless of whether there is a natural person criminally responsible.

In terms of penalties, the most generalized criterion is followed according to which the main penalty is the fine, which can be imposed in installments to avoid crises and in proportion to participation. Penalties such as dissolution, suspension of activities are also evident., closure of establishments open to the public, disqualification from obtaining government aid, disqualification from enjoying benefits or tax incentives, among others, which is why to reach the legislative consecration of the criminal liability of legal entities, the doctrinal path taken is not was stripped of multiple discussions.

As in Colombia in the case of environmental crimes, in Spain, before taking this decisive step, fragmentary attempts had been made to normatively establish the responsibility of legal entities against figures such as "price alteration in contests and auctions." public", enshrined in the partial reform of the Penal Code of 1995, where the prohibition of contracting with state entities was introduced as a penalty.

GERMANY

We can also observe the discussion that arose in Germany regarding the criminal liability of legal entities, in which the German discussion focused on two issues: on the one hand, the introduction of a penalty for associations that faces insurmountable dogmatic impediments and, on the other hand, the introduction of a penalty for associations that faces insurmountable dogmatic impediments. On the other hand, if there really is a criminal political need to introduce it into its legal system, traditional opinion denied the association's capacity for action because, unlike man, the association would be incapable of forming a will; This will of the association would be manifested in the adoption of agreements and in the case of majority decisions, it could deviate from the individual will, in turn other opinions assumed a capacity for action specific to the association, imputing to the association the action of its representatives. But the traditional opinion discusses the capacity for guilt of the association, because guilt must be determined in ethical-social terms; Only man could, based on free and responsible self-determination, decide against the law, only against man could the reproach of ethical misconduct be formulated. Faced with this, dogmatics affirms the possibility of organizational guilt specific to the association.

To this extent, Anglo-American law is used, where the doctrine of the "good corporate citizen" and the internal "Corporate Culture" serve as a basis for the guilt of the association, however, according to this, associations have great importance in social life., so much so that they must also have the obligation to ensure that the criminal behavior of their members is avoided, which is why it is considered that associations are sensitive to punishment and capable of being punished, since the penalty for the association would be felt mediately through the effect on its members and could thus lead to members behaving lawfully in the future. A kind of resocialization of the associations would also be imaginable, through the replacement of the guilty directors or the appointment of an administrator of their assets. We see how the penalty for these associations is valued by traditional opinion as an undue double punishment, which attacks against the principle "non bis in idem", so the representative would be burdened with both the penalty imposed on him, as well as the penalty for the association, but according to the contrary opinion of German dogmatics, it would not be a question of an undue double punishment, since the "non bis in idem" principle would only prevent the double punishment of an author, but would not prevent sanctions from being imposed

on several people, so it would be a question of personal responsibility and responsibility for the Asociation; To that extent, the penalty for the association would be only the consequence of participation in the power of the association, and the correct extension of the penalty would be a mere matter of its individualization, finally, in the imposition of the penalty for the association.

Traditional opinion sees a joint punishment of the innocent, since the principle "nulla poena sine culpa" would be violated. The penalty for the association would be directed against all members and with this also against innocents; Furthermore, the measure of punishment for a member would be determined according to their financial participation, not according to their personal responsibility, so in these cases the contrary opinion maintains that it would not be a "joint punishment", but rather that only "joint effects." The criminal reproach would be directed only against the association, not against the members; only representatives must appear in court; no penalties would be imposed on members of the association; In the event of a conviction by the association, they would not appear to have a criminal record; Furthermore, members could minimize the risk of conviction by electing trustworthy officers; Also in individual criminal law, third parties are often affected, for example, when there are personal or family ties.

Thus, for Germany today, the creation of a criminal law of associations and the discussion on its introduction continues unabated in German criminal science. As explained, the dogmatics of German criminal law are not insurmountably opposed to a penalty for associations, to the point that its introduction ultimately depends only on the acceptance of an imperative criminal political necessity, which, for good reasons just mentioned, is increasingly affirmed in criminal science, which is why, until now, a catalyst has been lacking, especially in the form of a serious case of corporate crime, in the light of which the imposition of a simple fine or contraventions that are perceived as insufficient, not only from the point of view of theory, but also from practice.

ARGENTINA

The Argentine penal code lacked provisions of this order; The first allusion in an organic text appeared in the comprehensive project of 1937, entrusted to Jorge Eduardo Coll and Eusebio Gómez by decree of 9/19/36, which had no success in the parliamentary sphere, the criminal liability of legal entities was reflected Therefore, gradually, in isolated legal provisions, generally related to the field of economic criminal law, therefore, below, a review of some of the provisions that incorporate criminal sanctions to entities of ideal existence is presented.

The occupational risk law (L. 24,557) provides in its article 32, inc. 5°: "In the case of legal entities, the prison sentence will be applied to directors, managers, trustees, members of the supervisory board, administrators, agents or representatives who have intervened in the punishable act." The penal tax regime (L. 24,769) refers, in its article 14: «When any of the acts provided for in this law have been executed in the name, with the help or for the benefit of a person of ideal existence, a mere association of fact or an entity that, despite not having the status of subject of law, the regulations attribute to it obligatory status, the prison sentence will be applied to the directors, managers, trustees, members of the supervisory board, administrators, agents, representatives or authorized persons. that they had intervened in the punishable act even when the act that would have served as the basis for the representation is ineffective.

After this review, which accounts for the wide and diffuse spectrum of precepts that contain modalities of responsibility of legal entities, it is worth noting that, in recent years, under the protection of the phenomenon of insecurity, enhanced in its real dimension by an exacerbated treatment On the part of certain mass media, a series of criminal reforms have been registered, whose common denominator is the aggravation of penalties, with particular emphasis on specific crimes. On the other hand, we see how the scope of these modifications to the regulations on criminal matters included the modification of article 23 of the Penal Code - which regulates confiscation - incorporating particular provisions for legal entities: «In all cases in which a conviction is imposed for crimes provided for in this Code or in special criminal laws, the same will decide the confiscation of the things that have been used to commit the act and the things or profits that are the product or profit of the crime, in favor of the national State, the provinces or the municipalities, except for the rights of restitution or compensation of the injured party and of third parties, When the perpetrator or the participants have acted as agents of someone or as organs, members or administrators of a person of ideal existence and the proceeds or profits of the crime have benefited the principal or the person of ideal existence, the confiscation will be pronounced against these.

At the doctrinal level, the recognition of criminal responsibility of legal entities divides specialized authors between those in favor of the thesis contrary to the recognition of criminal responsibility of the ideal entity, a principle immortalized under the Latin adage "societas delinquere non potest", between The authors stand out. Gustavo Eduardo Aboso and Sandro Fabio Abraldes.

Within the negative theses, three aspects are recognized: the first position denies the criminal capacity of legal entities by requiring an identity between the material author of the punishable act and the sanctioned entity;

The second is based on the premise that, although the crime is possible, it lacks punitive capacity due to the abstract nature of these entities, excluding any notion of atonement; and, finally, a third position rejects both the capacity to commit crimes and the punitive capacity. But in general, the assumption of one or another position is stereotyped, and depends on adherence to the postulates of liberal criminal law: the thesis that rejects responsibility bases its arguments, basically, in the light of essential political axioms, such as that of responsibility. for fact and guilt.

CHILE

In Chile, since the 1960s, the possibility of a state reaction has been legislatively accepted, this can be fines or dissolution with respect to those legal entities that in one way or another have been linked to a certain criminal action carried out by a natural person., this is a complementary reaction to the respective criminal sanction of the natural person, which has traditionally been understood as administrative measures or sanctions, the doctrine categorically refusing to accept that they could constitute sanctions of a criminal nature. This clear refusal is basically based on the strong presence that still maintains the Romanist principle that says: delinquere societas non potest, and, also, the majority conception prevailing in the national doctrine of a theory of crime founded on human action. as a basic structure, whether in its causalist or finalist variant.

Without prejudice to how interesting a discussion that currently does not exist in Chile could be about the nature of these sanctions and the relationships that they would

have with a democratic criminal law model; It must be noted that the truly problematic aspect regarding them occurs when justifying the very serious property effects, position in the market, that their abstract existence and practical imposition produce on legal entities.

In the Chilean legal system, an explicit or implicit clause aimed at regulating, in Chilean law, the problem of acting for another can also be recognized in the aforementioned norm, because this is how we can see that the only objective of this norm is to establish, a certain rule of imputation to determine on which natural person the penalty must be imposed when the normatively considered typical behavior has been carried out by a legal entity. This way, the criterion of the solution provided by the norm contained in article 58 of the Criminal Procedure Code is broken down into two copulative requirements: on the one hand, it is necessary that the natural person has intervened in the punishable act of carrying out the behavior described. by the legal type and by another, that in said intervention it has acted as part of an integral part of the organic or functional structure that the legal entity has.

COLOMBIA

In order to talk about the criminal responsibility of legal entities in Colombia, it is necessary to carry out a jurisprudential analysis since it is precisely the constitutional court, through its different rulings, that has given clarity to this matter in question, as we can see in Judgment C 320 of 1998 brings up the following: 1) The penalties that could be imposed on legal entities had to be possible and related to the defense of the protected interest. For example, a legal entity cannot be sentenced to imprisonment, but sanctions that affect its legal status can be imposed, such as the cancellation of commercial registration, or the closure of commercial establishments., all taking into account criteria of reasonableness and proportionality. 2) These sanctions took into account the dynamism of the business activity and the assets that were consolidated. In this sense, they were sanctions consistent with the nature of the companies and there was no impediment in the Political Constitution to being incorporated into the Colombian system. 3) In order to guarantee due process, the Court established that a presumption of objective responsibility is unconstitutional, since a subject of rights such as legal entities must not be condemned with the sole accreditation of the fact. Also in ruling C-843 of 1999, it tells us about the possibility of sanctioning the administrators and shareholders of the sanctioned legal entity. The Court also pointed out that the judge did not have parameters that would allow him to define a minimum and a maximum among the possible penalties. On the other hand, it seems clear that the implementation of a system of criminal liability of legal entities would meet the requirements of protection of relevant and essential legal assets for society, but we see how the new market dynamics, globalization and the complexity of companies, have opened a door to new forms of crime, within this crime we find for example: transnational financial crimes, mass poisoning with their products disguised as being good for the body, but which in reality affects the health of all humanity and especially Colombian society among other criminal practices, which are not sanctioned by the states that allow such irregularities and given the impossibility of investigating and punishing those naturally responsible for the crimes due to the very structure of the commercial society. However, there are positions that suggest that this last argument is not enough to justify the expansion of imputability; Certainly, it is also necessary to demonstrate that the administrative sanctioning law, which was delegated with

this responsibility, has not been able to fully comply with said purposes. Therefore, our Colombian legislator is obliged to legislate in criminal matters such behaviors carried out by ideal entities or commercial companies in our country, affecting the economy, public health and the rights that society in general has.

CONCLUSIONS AND RECOMMENDATIONS

- After having carried out a detailed analysis of the legal problem that addresses us, on the topic of the liability of legal entities, the conclusion that we try to reach in this article is premised on the recognition of the unavoidable need to contemplate in our legal system, expressly, the criminal responsibility of ideal or moral entities, being fully aware, however, that it implies a change of paradigm, as it means a reconsideration of the problem of the punishability of commercial or ideal entities, in which different categories or levels of the traditional Theory of Crime, are adapted to the configuration and particular characteristics of legal entities, in order not to neglect in any way the observance and respect of the guarantees of criminal imputation, in the same way we see that in Currently, there is a regulatory vacuum for the criminal sanction of said legal entities, so the Colombian legislator must legislate on this matter in order to protect the rights of society and avoid impunity for crimes committed by these moral entities, as well. It must be recognized that any future legislation regarding the criminal liability of legal entities must be based on a specific theoretical model, collecting relevant guidelines from traditional theory, but recognizing as a basic premise the qualitatively different nature of institutional action or society, that is, of the legal entity.
- On the other hand, it must be noted that the arguments put forward by those who deny the criminal responsibility of legal entities and especially, the inability to act, lack of capacity for guilt, contrariness with the function and purpose of the penalty, are refuted by admitting their possible reworking and adaptation to the new system proposed using the Theory of Reality and especially the power to generate a change in the paradigm of responsibilities that derive from ideal or moral entities in criminal matters.

REFERENCES

• Valencia, A (2013). la responsabilidad penal de las personas jurídicas. Universidad de Málaga. Aportaciones al I congreso nacional de jóvenes investigadores en ciencias jurídicas facultad de derecho.

• Gustavo Eduardo, Sandro Fabio (2000) la responsabilidad de las personas jurídicas en el derecho penal. Editorial B.

• Edgardo Alberto (2001). "Teoría del Delito y de la Pena" –Imputación delictiva – Editorial Astrea – Primera reimpresión – Buenos Aires.

• Castro y Bravo, (1981). "La persona jurídica", Editorial. Cívitas, Madrid España.

• Luis y Gullón, Antonio, (2003). Sistema de Derecho Civil (VOL. I), Editorial. Tecnos, Madrid, España.

• Gómez, M. (2015). Introducción a la Responsabilidad Penal de las Personas Jurídicas. España.

• González, P. (2012). La Responsabilidad Penal de las Personas Jurídicas. Granada: Editorial de la Universidad de Granada.

• De Martino Carreño, J. S., & Guerrero Sabogal, S. (2018). Análisis de la responsabilidad penal de las personas jurídicas en Colombia, perspectivas y críticas a la sanción administrativa: un camino hacia la pena privativa de la autonomía empresarial.

• Colombia. Ley 1474 del 2011. Por la cual se dictan normas orientadas a fortalecer los mecanismos de prevención, investigación y sanción de actos de corrupción y la efectividad del control de la gestión pública. Julio 12 del 2011.

• Colombia. Ley 599 del 2000. Por la cual se expide el Código Penal. Julio 24 del 2000.

• Colombia. Ley 906 del 2004 Por la cual se expide el Código de Procedimiento Penal.

• Colombia. Ley 222 de 1995. Por la cual se modifica el Libro II del Código de Comercio, se expide un nuevo régimen de procesos concursales y se dictan otras disposiciones.

• Corte Constitucional, Colombia, Sentencia C 320 de 1998, 30 de junio de 1998. Magistrado Ponente: Eduardo Cifuentes Muñoz. Disponible en: https://www.corteconstitucional.gov.co/relatoria/1998/C-320- 98.

• Corte Constitucional, Colombia, Sentencia C 762 de 2009, 29 de octubre de 2009, magistrado ponente: Juan Carlos Henao Pérez. Disponible en: https://www.corteconstitucional.gov.co/relatoria/2009/C-762-09.htm.

• Corte Constitucional, Sentencia C 564 del 2000, 17 de mayo de 2000, magistrado ponente Alfredo Beltrán Sierra. Disponible en: https://www.corteconstitucional.gov.co/relatoria/2000/c-564-00.htm.

• Corte Constitucional, Sentencia C 843 de 1999, 27 de octubre de 1999, magistrado ponente Alejandro Martínez Caballero. Disponible en: https://www.corteconstitucional.gov.co/relatoria/1999/C-843-99.htm.

• Corte Constitucional, sentencia C-703-10, 6 de septiembre de 2010, magistrado ponente Gabriel Eduardo Mendoza-Martelo. Disponible en: http://corteconstituional.gov.co/relatoría/2010/c-703-10.htm